Atlanta Motor Lines, Inc. *and* Teamsters Local 728. Case 10–CA–25244

September 21, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On December 27, 1991, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Atlanta Motor Lines, Inc., Conley, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We are substituting a new notice to more fully conform to the Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell union stewards in the presence of employees that the union recommendation of employees for promotion constitutes a ''kiss of death,'' and that employees with strong union ties will not be hired.

WE WILL NOT interrogate employees about any union recommendation for their promotion, or about their relationship with the Union.

WE WILL NOT tell employees that we will not hire anybody sympathetic to the Union, or that it would be best for employees with such sympathies to find jobs elsewhere.

WE WILL NOT discourage membership in Teamsters Local 728, or any other labor organization, by refusing to promote employees or accord them regular status because of their union activities or sympathies, and WE WILL NOT discriminate against them in any other manner.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer Jerry Haney, Derol Braddy, and Wayne Hume employment as regular full-time employees in their former type of work, and make them whole, with interest, for the discrimination against them.

ATLANTA MOTOR LINES, INC.

Victor McLemore, Esq., for the General Counsel.
Walter O. Lambeth, Esq. and *Victor J. Maya, Esq. (Elarbee, Thompson & Trapnell)*, of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on April 2, 1991, by Teamsters Local 728 (the Union), and complaint issued on May 16, 1991. It alleges that Atlanta Motor Lines, Inc. (Respondent, or the Company), in November and December 1990, and January 1991, engaged in various acts violative of its employees' rights under Section 8(a)(1) of the National Labor Relations Act (the Act), to wit, interrogation of employees concerning their union activities, and threats that Respondent would not hire individuals who engaged in union activities. The complaint further alleges that, on about November 12, 1990, Respondent refused to hire casual employees Jerry Haney, Wayne Hume, and Derol Braddy as regular, full-time employees, because of their union activities. Finally, the complaint alleges that the aforesaid casual employees would not have been laid off on January 21, 1991, if the Company had hired them as full-time employees in November, and, accordingly, that its backpay liability extends beyond the layoff date.

This case was heard before me in Atlanta, Georgia, on June 25 and 26, 1991. Thereafter, the General Counsel and Respondent filed briefs. On the entire record, including my

observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a Georgia corporation with an office and place of business located at Conley, Georgia, where it is engaged in the interstate transportation of freight. During the calendar year preceding issuance of the complaint, a representative period, Respondent received gross revenues in excess of $50,000 for the transportation of freight from the State of Georgia to points located outside the State of Georgia. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Collective-Bargaining Agreement and the Status of Casual Employees*

Underlying the facts in this case was the desire of casual employees to become regular employees. The Company and the Union were parties to a 3-year collective-bargaining agreement, executed in October 1988, whereby the Company recognized the Union as the representative of its city pickup and delivery drivers, helpers, and dockworkers. The agreement refers to four classifications of employees—probationary, casual, temporary, and regular. A casual employee is one who is ''not on the regular seniority list and who is not serving a probationary period.'' The contract further defines casual employees as ''supplemental''—those hired to supplement a particular shift and who are to be terminated at the end of the shift—and ''replacement'' casuals—those hired to replace employees who are absent for various reasons.[1]

Executive Vice President Ed J. Copenhaver described casual employees somewhat differently. Although they are not guaranteed a certain amount of work, some in fact work a regular 40-hour week, and are expected to report at the regular starting time. Others are called when needed. A ''part-time casual'' is an employee with another job, and who works less than 8 hours daily or 40 hours weekly. Copenhaver testified that the three alleged discriminatees were ''full-time'' casuals.

B. *The Union's Election of a Steward and the Company's Reaction*

The Union conducted an election for a steward on July 31, 1990. One of the candidates was Ronald Brooks, and another was Clyde Dockins. Alleged discriminatee Jerry Haney was a casual employee, employed as a dockworker, who favored Brooks. Haney testified that Brooks was sympathetic to the desire of casual employees to acquire regular status.

The election was conducted in a company break room, and the three alleged discriminatees voted. Haney testified that several of the city drivers, who were regular employees, objected to votes being cast by casual employees. An exchange of words took place, in particular between Haney and a driver named James Dyer. Haney agreed that he and Dyer ''raised their voices,'' but denied that there was anything ''disruptive'' about the incident. Haney simply voted and walked out.[2] Dyer did not testify.

Alleged discriminatee Derol Braddy was also a casual employee employed as a dockworker. He affirmed that the city drivers objected to voting by the casual employees, and that city driver Roger Murdoch, a union steward at the time, told him that he did not think the Company would hire Braddy as a full-time employee if Braddy voted in the election. Nonetheless, Braddy voted. Murdoch did not testify.

Alleged discriminatee Wayne Hume, a casual employee, also voted, but did not recall any objections from full-time employees.

Dockins was one of the stewards elected in July, while Brooks was not selected at that time. However, Dockins resigned for personal reasons about 2 months later, and Brooks succeeded him.

Haney testified that he had a conversation in his trailer with Terminal Manager Morris Riddle about a month after the election. According to Haney, he talked with all the supervisors about becoming a regular employee, and made this request to Riddle during the conversation. Riddle told him to work hard, have a good attitude, and do what his supervisors told him to do. Riddle left the trailer, and then returned and said: ''Jerry, I've been meaning to ask you about this confrontation that you had in the break room with those other employees during the steward election.'' Haney told Riddle that the city drivers were ''harassing'' him about voting, that ''a few words were exchanged,'' and that was the extent of it.

Haney averred that Riddle left, and then returned a second time. ''Jerry,'' he said, ''I've been thinking about what you just told me and I just wanted to know, did you really ever give it any thought what management thought about you voting in the election?''

Haney responded that he didn't think that the Company was concerned about whether he voted. According to the transcript, Riddle replied: ''Well, I want to give you my opinion. I feel that casual employees are somewhat like transient employees and they should be voting on issues that affect regular employees.''[3]

Riddle testified that he heard about Haney's being involved in a ''loud and abusive argument with drivers'' in the break room, and that this had caused a ''disruption of operations.'' He investigated the matter the ''next day,'' and talked with Dyer. Riddle also agreed that he talked with Haney about the matter, but his testimony is not explicit as to when this conversation took place. He denied telling Haney that he was like a transient employee, that he should

[1] R. Exh. 8.

[2] The record indicates that the votes of the casual employees were not counted by the Union.

[3] The excerpt from the transcript quoted above, from L. 19 on p. 23, is a nonsequitur, since if casual employees were like transient employees it is unlikely that Riddle would have advocated their voting in union elections, nor is it likely that he would even have raised the subject if he had not opposed Haney's voting. It is possible that the word ''not'' was inadvertently omitted between the words ''should'' and ''be'' in L. 19. However, since Riddle denied telling Haney that he should not have voted and the complaint does not allege any statements or questions by Riddle as independently violative of the Act, I refrain from correcting the transcript.

not be voting in union elections, or that the city drivers were upset over this fact. However, Riddle agreed that he told Haney that he did not want any more ''disturbances at the terminal.''

Haney's uncontradicted testimony about the voting shows that only words were exchanged by employees. Since the complaint does not allege that any of Riddle's statements were independently violative of the Act, I consider it unnecessary to resolve the conflicts in the testimonies of Haney and Riddle. However, it is undisputed that they did have a conversation about the incident in the break room, and that Riddle considered it to be a ''disruption of operations.'' It is unlikely that there could have been any such disruption during a union election in the break room. Accordingly, the incident is significant only as it throws light on other evidence in the case.

C. *Haney's, Hume's, and Braddy's Attempts to be Appointed Regular Employees—Alleged Unlawful Statements of Supervisors William Poole and Harold Shoup*

1. The attempts to attain regular status

Haney had been employed as a casual employee since July 1989. He testified that he was working a ''regular schedule'' and, about a year later, asked all the supervisors whether he could be appointed to regular status. They replied that he had to work hard, have good attendance, possess a good attitude, and do what he was told. Derol Braddy had been employed as a casual employee since June 1989, and asked several supervisors to recommend him for appointment as a regular employee. Wayne Hume was employed as a casual employee for several months, and had conversations with Terminal Manager Riddle about promotion to regular status. According to Hume's uncontradicted testimony, Riddle told him, after about 5 months of employment, that the supervisors liked him, that the Company was about to make some casuals regular employees, and that Hume would be one of the next ones appointed.

Clyde Dockins worked with Haney, Hume, and Braddy on the night shift, and called them ''good employees.'' Other supervisors gave Dockins the same opinion. Prior to his resignation as steward in about September 1990, Dockins heard that the Company was going to hire regular employees. He recommended to Terminal Manager Riddle that the Company hire the three alleged discriminatees, and two others. Riddle replied that he did not have anybody that was ''qualified.''

2. Alleged unlawful statements of Supervisor Poole

As indicated, Ronald Brooks became a union steward about 2 months after the July 1990 election, following Dockins' resignation. Brooks testified that, on November 9, he wrote a note to Copenhaver recommending Haney, Hume, and Braddy for advancement to regular status. Copenhaver acknowledged receipt of this recommendation.

Brooks testified that he had a conversation with Supervisor William Poole[4] on November 10, in which he recounted what he had done. According to Brooks, Poole replied that Brooks had given the employees the ''kiss of death.'' Brooks asked the reason, and Poole replied: ''Because they [the employees] had shown strong union ties and wanted to vote—wanted to be part of the Union. I guarantee you they would probably never be hired because of that.'' Poole corroborated Brooks' account of the conversation, adding that the steward was viewed as a ''trouble maker,'' and that Haney, Hume, and Braddy were considered to be associated with him.

Braddy testified that he overheard this conversation, and heard Poole tell Brooks that because the latter had recommended Braddy, the Company would probably not hire him—he was ''too close(ly) aligned to the Union.''

Poole also averred that Hume and Braddy were both good employees, although the latter had to be corrected on occasion, and that Haney was an ''excellent'' employee. When the Company was laying off employees a short time later, Poole asked Terminal Manager Riddle why Haney was being laid off. Riddle replied that Haney had a dispute with one of the drivers over the Union in the break room.

Alleged discriminatee Haney testified without contradiction that he had several conversations with Poole. In January 1991, after several casual employees had been promoted to regular status, Poole told him that he was sorry that Haney had not been ''put on,'' that Haney was a good worker and deserved to be made a regular employee, but that every time Poole brought up Haney's name with Riddle ''this confrontation thing with the city drivers kept coming up.'' The Company would not put on anybody they felt was sympathetic to the Union, and the best thing for Haney to do was to find a job elsewhere. I accept Haney's averments of his conversation with Poole as truthful testimony.

Wayne Hume testified without contradiction that Poole told him that he ''hung around the Union people too much and that Morris Riddle didn't want people that was big on the Union being put on regular.'' According to Poole, this was the reason Hume was not made a regular employee. I credit Hume's testimony.

Riddle denied telling Poole that Haney, Hume, and Braddy were not selected for regular status because they supported the Union. This denial does not directly rebut Poole's testimony, which I credit.[5] I also credit the corroborated evidence as to Poole's statements to Brooks.[6]

3. Alleged unlawful interrogation by Supervisor Shoup

Haney testified that, one evening when he was working, Harold Shoup[7] asked him whether he had requested Brooks to write the letter to Copenhaver recommending the three alleged discriminatees for regular employment. Shoup denied asking this question.

Haney was a more truthful witness than Shoup. The latter gave perfunctory denials to questions about other conversations, including one attributed to him by Clyde Dockins, a company employee at the time of his own testimony and a

[4] The pleadings establish that Poole was a supervisor during the period of his employment. I conclude that he was also an agent of Respondent.

[5] Poole had been laid off or dismissed prior to his testimony, and the Company points to this as evidence of bias. However, Poole affirmed that he had already obtained another job and was prepared to resign. He was a believable witness.

[6] The complaint alleges that the statements Poole made to Brooks on November 10, 1990, and to Haney in January 1991, constituted unfair labor practices.

[7] The pleadings establish that Shoup was a supervisor, and I conclude that he was also an agent of Respondent.

trustworthy witness. I credit Haney's testimony that Shoup asked the question attributed to him.[8]

D. *The Selection of Regular Employees*

1. The selection process

Executive Vice President Copenhaver asserted that employees are selected for regular status as a result of a poll of the supervisors. There are six supervisors of the dockworkers and four supervisors of the drivers, but only the dock supervisors are polled on the promotion of dockworkers. This includes Terminal Manager Riddle. The factors to be considered are attendance, attitude, productivity, and work habits. Supervisors are given lists of all the casual employees, and, on receiving their selection of the top three employees, Copenhaver gives a score to each employee based on his rating by a particular supervisor, and determines the employee's comparative overall rating. Copenhaver does not keep a record of the tally sheets.

Copenhaver contended that he did not veto or alter the results of the poll. However, Union Steward Brooks testified that supervisors had informed him that their recommendations were not always taken.

Copenhaver argued that, since dockworkers work an 8-hour shift and supervisors 10 hours, there is a shift overlap giving different supervisors an opportunity to observe workers not on their regular shift. However, Dock Supervisor Donald Russell testified that Haney, Hume, and Braddy worked only 30 minutes to an hour for him on a shift changeover, and that he voted only for employees that worked a full 8-hour shift directly under him—he had greater opportunity to observe them. Dock Supervisor Harold Shoup testified that he did not rate Haney, Hume, or Braddy and knew nothing about their performance, attitudes, or attendance.

2. The appointment of regular employees in 1990—the comparative qualifications of Haney, Hume, and Braddy

a. *The selected employees*

Michael Day was made a regular employee on August 13, 1990, about 2 weeks after the Union's steward election. In 1989, he received a ''friendly warning'' for unsatisfactory work performance, a written warning for excessive absence or lateness, and another for improper unloading. Further violations would result in a 2-day suspension and a final letter of warning.[9] In January 1990, he received a written warning for unsatisfactory work performance, and another such warning a month later for leaving freight on the dock, causing a shortage.[10] Next, Day was the subject of a page-long memo to management from Supervisor Harry Kimball. The latter recited a dispute with Day over whether he had been authorized to take a day off the following weekend, and Day's argument that he should be made a regular employee. Kimball told Day that the discussion was over, and added in his memo that Day should be terminated if he did not show up on the day he had requested to be off.[11] Jerry Haney testified without contradiction that Day was fired, and then hired back as a regular employee. There is no documentary evidence of a discharge of Day. The testimonial evidence is that he was promoted on August 13, 1990, but a ''payroll change slip'' indicates that it was November 30, 1990.[12]

Copenhaver and Riddle were both asked whether Day was the best casual employee. Copenhaver responded merely that he received the most votes from the supervisors. Although Riddle, as terminal manager, was entitled to participate in the voting, he testified that he did not recall rating Day. Nonetheless, he asserted that Day was the ''best'' employee at the time. Supervisor Harry Kimball, the author of the memo about Day noted above, denied that he recommended Day for full-time employee. None of the other supervisors mentioned Day.

Another casual employee promoted to regular status in late 1990 was Albert Haney. Haney received a ''friendly reminder'' in October 1990 for counting freight incorrectly.[13] Wayne Hume testified without contradiction that he worked with Albert Haney, that the latter could not read a freight bill, and asked Hume for assistance in ''matching up'' the bills. The supervisors knew this, according to Hume. Hume also testified that Supervisor Kimball told him that Albert Haney was made a regular employee because he was not closely associated with the Union. Kimball denied making the latter statement. Hume was a more reliable witness, and I credit his testimony.

James Brock filed an employment application in August 1990,[14] was thereafter employed, and received a ''friendly reminder'' the following month for excessive absence or lateness.[15] In November 1990, Brock was issued a ''written warning'' for the same offense.[16] He was thereafter added to the seniority list and given a raise.[17]

David Chelsey was given a ''friendly warning'' in September 1990 for misloading freight and told that ''corrective action'' would be taken absent improvement.[18] In December he was added to the seniority list and given a raise.[19]

Gary Tester, Walter Parks, James Puckett, and David Lapsky, received appointments as regular employees.[20] There is no evidence of the qualifications of these employees except management's contention that those appointed to regular status received more supervisory votes than the alleged discriminatees. Jerry Haney testified that Tester, Chelsey, Puckett, and Albert Haney had less seniority than he, himself, had. This apparently would also apply to Brock. Copenhaver asserted that length of service was not a factor in promotion to regular status.

[8] Haney did not specify the date of the conversation. The complaint alleges that it occurred on December 12, 1990. I infer that the conversation took place subsequent to Brooks' letter to Copenhaver in November, which was the subject of Shoup's inquiry, and prior to Haney's layoff in January, i.e., in about December 1990.

[9] G.C. Exhs. 7–9.

[10] G.C. Exhs. 10, 11.

[11] G.C. Exh. 12.

[12] G.C. Exh. 13.

[13] G.C. Exh. 20.

[14] G.C. Exh. 16.

[15] G.C. Exh. 15.

[16] G.C. Exh. 14.

[17] G.C. Exh. 17.

[18] G.C. Exh. 18.

[19] G.C. Exh. 19.

[20] Testimonies of Jerry Haney, Clyde Dockins, and Executive Vice President Copenhaver; R. Exh. 6.

b. *The qualifications of Jerry Haney, Hume, and Braddy*

As set forth above, Executive Vice President Copenhaver did not keep tally sheets of the supervisory voting. He stated that there was no writing in existence which showed the rankings of casual employees for full-time employment. Copenhaver contended that he could not recall whether the alleged discriminatees received votes in the top three of any of the rankings.

Jerry Haney was employed in July 1989. In April 1990, he received a written warning for improper checking of freight, another in July for failure to change a placard on a truck, and, in October, a ''friendly reminder'' for failure to load out a complete shipment.[21] As indicated, Supervisor Poole testified that Haney was an ''excellent'' employee, and recommended him for regular status. Dockins, who worked with Haney, called him a ''good'' employee and stated that other supervisors had the same opinion. At the hearing, Supervisors Russell and Shoup knew little or nothing about Haney's performance as an employee. Supervisor Kimball's pretrial affidavit noted that he was a good employee. Dockins was a current employee at the time of the hearing, a circumstance which adds credibility to his testimony because it is unlikely that he would be fabricating.[22] I conclude that other supervisors did tell Dockins that Haney was a good employee.

As set forth above, Derol Braddy was employed as a casual employee in June 1989. He received two written warnings prior to Steward Brooks' letter in November 1990, recommending him for regular status—one in August 1989 for failure to submit a bill to the rating department, and another in February 1990 for puncturing the roof of a trailer with a forklift.[23] Subsequent to Respondent's allegedly unlawful refusal to give him regular status in November 1990, Braddy received two written warnings for improper counting and handling of freight.[24]

At the hearing, Supervisors Russell and Shoup testified adversely about Braddy's ability as compared to other employees, but admitted that they did not rate him or knew little about him. Supervisor Poole affirmed that Braddy had a ''bad attitude'' in about November 1990, but that this improved ''somewhere after Christmas,'' and that Poole told Braddy he appreciated the improvement. He characterized Braddy as a ''good'' employee.

Kimball testified that he rated Braddy among the top three candidates, but affirmed that he had a conversation with him in late 1990 in which the employee said that it was all right that he had not been selected, and that he was going to sell drugs. There is no such accusation in Kimball's pretrial affidavit. Braddy denied making these statements, and I credit his denial. Other supervisors told Dockins that Braddy was a good employee.[25]

Wayne Hume had been employed as a casual dockworker for about 9 months prior to his layoff in January 1991. There is no evidence that he received any warning or ''friendly reminder'' during his period of employment. Nonetheless, Supervisors Russell and Shoup testified that other employees were better qualified for regular status.

Hume affirmed that in about September or October 1990, he asked Supervisor Kimball for advancement to regular status. The supervisor replied, according to Hume, that he would like to do so, but that Terminal Manager Riddle would probably terminate Kimball in that event. Kimball denied making this statement. I credit Hume. Kimball admitted ranking Hume among the top three candidates. As set forth above, Hume testified without contradiction that Riddle told him that the supervisors liked him, and that he would be given regular status. Other supervisors told Dockins that Hume was a good employee.[26]

E. *The January Layoffs*

Respondent laid off the alleged discriminatees on January 21, 1991, assertedly because of a decline in business. It submitted income statements for the 3-month period ending February 1991. The December statement shows a decline in operating income of about $200,000 compared to the same month the prior year, but an overall increase of more than $300,000 in 1991 as compared to the prior year. The figures for January 1991 are also lower than those for the same period the prior year, but the reduction is less than $100,000.[27]

Respondent submitted a list of individuals laid off after November 1, 1990. The alleged discriminatees were the only ones laid off in January 1991.[28] As set forth above, Haney, Hume, and Braddy were full-time casuals. Executive Vice President Copenhaver testified that only the names of casual employees appear on the list. I therefore conclude that Respondent did not lay off any employees with regular status.

Copenhaver acknowledged that the Company hired Deware Henderson on January 14, 1991, about a week before the layoffs of Haney, Hume, and Braddy. The Company contended that Henderson was hired as a city driver, because he had a chauffeur's license. However, Copenhaver conceded that Henderson was employed as a dockworker until March 1991. Dockins testified that Henderson was made a regular employee as a city driver after being a casual dockworker for about a month.

F. *The Recall of Casual Employees*

1. Summary of the evidence

Dockins testified that freight became heavy on about February 11, 1991, and that he had a conversation with Supervisor Kimball about recall of Haney, Hume, and Braddy. Dockins stated that Kimball acknowledged that there was a need for help and said he would call in the morning shift for overtime work. Dockins then asked: ''Why don't you call the guys that's on layoff? Or are they fired?'' Kimball asserted

[21] R. Exhs. 1–3.

[22] In addition to Dockins' status as a current employee, his testimony is supported by other evidence. *Air Products & Chemicals*, 263 NLRB 341 fn. 1 (1982).

[23] R. Exhs. 4, 5.

[24] R. Exhs. 6, 7.

[25] Supra at fn. 22.

[26] Ibid.

[27] R. Exhs. 12, 13. The General Counsel does not argue that the layoffs were unlawful. Rather, he contends, the alleged discriminatees would not have been laid off but for Respondent's unlawful refusal to give them regular status in November 1990—and, accordingly, that their backpay periods continue beyond the layoff dates.

[28] R. Exh. 15.

that they were ''on call,'' whereupon Dockins advised him that the Company could save overtime by calling them back. Kimball replied that Riddle had instructed him not to recall these individuals.

''They was three of your best workers,'' Dockins stated.

''I know that,'' Kimball replied, whereupon Dockins said that it looked like the Company was trying to ''hire the sorry ones [and] get rid of the good ones.'' ''It looks that way.'' Kimball replied.

Dockins affirmed that he had conversations with two more supervisors at about the same time. Russell told Dockins that he thought Riddle was trying to close the business down, because he laid off three of his best employees. In addition, according to Dockins, he told Supervisor Harold Shoup to recall the alleged discriminatees, and the latter replied that he would ''give anything'' if he could do so.

Kimball denied telling Dockins that he was prohibited from calling back the three alleged discriminatees. Instead, he averred, he told Dockins that he could not recall *any* casuals. Russell and Shoup gave similar testimony.

There is conflicting evidence on how many casual employees were recalled. Copenhaver asserted that only one[29] was brought back. Kimball testified that work was ''extremely heavy'' in April, and that the Company was ''behind.'' He attempted to call in casuals, but the only one who responded was Hume, who worked 1 day. Dockins testified that ''some'' of the casuals were recalled.

In April 1991, the Company placed an ad for dockworkers in the classified section of a newspaper.[30] Copenhaver testified that the ad was necessary because the Company was then negotiating with the Union for a renewal of the contract, and the Company needed ''available employees in case it was necessary to continue to operate.''

2. Factual analysis

On the basis of Dockins' unrebutted testimony that freight was heavy in about mid-February; that Kimball acknowledged a need for help; Kimball's own testimony that work was extremely heavy in April; and the fact that the Company placed an ad for dockworkers in April, I conclude that the Company did need employees of this nature in February and April 1991. It would have been contrary to the Company's business interests not to ship freight on hand. In addition, Dockins was a current employee at the time of his testimony, which enhances his trustworthiness.[31] Accordingly, I credit his testimony that some casuals were recalled to work, and reject the supervisors' assertions that they were not allowed to recall any casual employees.[32]

I further credit Dockins' testimony that Shoup told him he would give anything if he could recall Haney, Hume, and Braddy, that Russell told Dockins he thought Terminal Manager Riddle was trying to close the business down by laying off his three best employees, and that Kimball said he had been instructed not to recall them.

Hume was recalled for 1 day in April, essentially because no other casual employee was willing to work.

G. *Legal Analysis and Conclusions*

1. The alleged violations of Section 8(a)(1)

The evidence establishes that the Company viewed the alleged discriminatees as closely aligned with a union steward (Ronald Brooks) whom it considered to be a ''trouble maker.'' In early November 1990, the steward wrote a letter to the Company recommending the three alleged discriminatees for appointment to regular status. The evidence also establishes that a supervisor (William Poole) at about the same time had a conversation with the steward, overheard by one of the alleged discriminatees. In this conversation the supervisor stated that the steward had given the alleged discriminatees the ''kiss of death'' by his letter of recommendation. They were viewed as having strong union ties, and probably would never be hired for this reason.

The same supervisor (Poole) told an alleged discriminatee (Jerry Haney) in January 1991 that the Company would not hire him because it felt he was sympathetic to the Union, and that it would be best for him to find a job elsewhere.

These statements were coercive under established Board law, and I find that Respondent thereby violated Section 8(a)(1) of the Act.

The complaint also alleges unlawful interrogation, and the evidence establishes that another supervisor (Harold Shoup), in about December 1990, asked one of the alleged discriminatees (Jerry Haney) whether he had requested the union steward to write the letter of recommendation. The issue is whether, under all the circumstances, the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Rossmore House*, which concerned a union adherent, the Board quoted with approval the language of the Seventh Circuit Court of Appeals: ''To fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.'' *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). The same standard is also applied to employees who are not known union adherents. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

Prior to Supervisor Shoup's question to Haney in December, Supervisor Poole had already made the unlawful statements cited above in connection with the letter of recommendation. Shoup's question attempted to ascertain Haney's relationship with his union steward and the extent to which he was involved with the ''kiss of death'' letter. There was no assurance from Shoup that Haney would be fairly considered for regular status despite Poole's statements. I conclude that the natural tendency of such a question was to coerce Haney with respect to the exercise of his statutory rights, and that the inquiry was violative of Section 8(a)(1).[33]

[29] Julian Latimer.

[30] G.C. Exh. 3.

[31] Supra at fn. 22.

[32] Although the Company submitted a list of laid-off employees and another list of newly hired employees, neither list indicates the recall of employees. G.C. Exh. 6; R. Exh. 15.

[33] *Kurz-Kasch, Inc*., 286 NLRB 1343 fn. 1 (1987), revd. on other grounds 865 F.2d 757 (6th Cir. 1989); *Sorenson Lighted Controls*, 286 NLRB 969, 976–977 (1987).

2. The alleged discrimination

The Board has approved of the following criteria for establishing a prima facie case of a discriminatory refusal to hire:

> Essentially, the elements of a discriminatory refusal to hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. *Big E's Foodland, Inc*., 242 NLRB 963, 968 (1979).

More recently, the Board applied the *Wright Line*[34] standard to a refusal-to-hire case, and concluded that, once the General Counsel has established that protected conduct was a ''motivating factor'' in the employer's decision, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. *Fluor Daniel, Inc*., 304 NLRB 970 (1991).

The record establishes a strong prima facie case. The Company viewed the alleged discriminatees as closely aligned to a union steward considered to be a troublemaker, and Supervisor Poole told the steward in November 1990 that they were not put on regular status because of the steward's recommendation for such action and the Company's belief that they had strong union ties. Other supervisory statements and the Company's refusal to recall the alleged discriminatees when it needed dockworkers (with one isolated exception) support the prima facie case.[35]

The alleged discriminatees voted in a union election for a steward, and a disagreement which one of them had with other voters over his own right to vote was deemed a ''confrontation'' by the terminal manager and a ''disruption'' of operations, despite the absence of any evidence of a business interest in the election or any disruption. When later supervisory recommendations of promotion of the alleged discriminatees were made, the asserted ''confrontation'' was brought up by the terminal manager as a reason for failing to act on the recommendation. This company concern with the alleged discriminatees' participation in union activities, and its failure to recall them (with one isolated exception) at a time when it needed employees in early 1991, add weight to the prima facie case.

The Company's defense is predicated on the asserted failure of the supervisors to select Haney, Braddy, or Hume for regular status. This argument is not persuasive. The evidence does not indicate that the selection process was fair and impartial. Although dock supervisors were supposed to rate all casual employees, including those on other shifts, two of the supervisors[36] admitted that they did not know the qualifications of the alleged discriminatees, and did not rate them. Although Executive Vice President Copenhaver contended that he did not ''veto'' the votes of the supervisors, Steward Brooks testified that supervisors told him their recommendations were not always determinative. Finally, there is no documentary evidence of the voting process, no tally sheets or memoranda—simply the testimony of company witnesses. Indeed, the record does not even indicate how many such alleged votes were conducted, or the dates.

The results of the asserted voting cast further doubt on the Company's defense. Although Haney had received three warnings or reminders scattered over more than a year of employment, Supervisor Poole rated him an ''excellent'' employee, and other supervisors told Dockins that he was a ''good'' employee. Kimball testified at the hearing that others were better, but he previously admitted to Dockins that Haney was one of his three best workers. Russell and Shoup gave adverse opinions, but admitted that they did not know Haney's qualifications.

Braddy had four warnings over a period of employment extending more than a year. Poole rated him a ''good'' employee after an improvement in attitude, while other supervisors gave Dockins the same opinion. Kimball in fact rated Braddy among the top three candidates. Although Russell and Shoup had different opinions, they did not know Braddy's qualifications.

Finally, Wayne Hume's employment record was the only one in this case which did not indicate any warnings or reminders. Riddle told him after about 5 months of employment that the supervisors liked him and that he would be one of the next casuals selected for regular status. Kimball rated Hume among the top three candidates, and supervisors gave favorable opinions about Hume to Dockins. Russell's and Shoup's adverse comments have little probative weight for the reasons given above.

The records of some of the selected employees are in stark contrast to those of the alleged discriminatees. Michael Day received six warnings and was the subject of a supervisory memo suggesting termination. Nonetheless, he was given regular status. Of five supervisory witnesses, not one admitted voting for him. Albert Haney could not read a freight bill and was given a reminder for failing to count freight accurately, yet was accorded regular status—in the opinion of Supervisor Kimball, because he was not closely associated with the Union. Other employees with less seniority than the alleged discriminatees, and warnings after brief periods of employment, were made regular employees. The record of other selected employees is unknown.

The pretextual nature of Respondent's defense is further shown by the fact that it hired an employee in January 1991, about a week before it laid off Haney, Braddy, and Hume. Although Respondent asserted that it hired the new employee as a driver, it utilized him for about 2 months in the same type of work in which Haney, Braddy, and Hume were engaged.

Because of this inconsistency, the deficiencies in the selection process, and the fact that it did not result in selection of the best applicants, I reject the Company's defense. Accordingly, the General Counsel's prima facie case is not rebutted. I therefore find that, by refusing to grant Jerry Haney, Derol Braddy, and Wayne Hume regular full-time status on November 12, 1990, because of their union sympathies or because the Company suspected this to be the case, Respondent thereby discriminated against them in violation of Section 8(a)(3) and (1) of the Act.

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[34] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[35] Poole's similar statement to Haney in January 1991, and to Wayne Hume; and statements of Supervisors Kimball, Russell, and Shoup showed company animus against the alleged discriminatees.

[36] Donald Russell and Harold Shoup.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Atlanta Motor Lines, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Local 728 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by

(a) Telling a union steward in a conversation overheard by an employee that the steward had given three employees the ''kiss of death'' by recommending them for promotion to regular status, that these employees were viewed as having strong union ties, and probably would never be hired for this reason;

(b) Asking an employee whether he had requested the union steward to prepare the above-described letter of recommendation; and

(c) Telling an employee that the Company would not hire him because he was sympathetic to the Union, and that it would be best for him to find a job elsewhere.

4. Respondent violated Section 8(a)(3) and (1) of the Act on November 12, 1990, by failing to promote casual employees Jerry Haney, Derol Braddy, and Wayne Hume to regular full-time employee status because of their union activities and sympathies, or because the Company suspected such activities and sympathies.

5. Respondent laid off various casual employees in late 1990 and early 1991, and laid off the above-named employees on January 21, 1991, but did not lay off any employees with regular status.

6. The unfair labor practices described in paragraphs 3 and 4 above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the purposes of the Act.

As indicated, the complaint alleges that ''but for'' Respondent's unfair labor practices, the discriminatees would not have been laid off on January 21, 1991, and, accordingly that backpay liability continues after that date. In his brief, the General Counsel makes a similar argument.[37]

I have concluded that Respondent did not lay off any regular employees in late 1990 and early 1991. Accordingly, it is unlikely that the discriminatees would have been laid off if they had achieved this status. Although the complaint does not allege that their layoffs were unlawful, nor do I make any such finding, the events subsequent to the unlawful refusal to hire relate back to that unfair labor practice, and show that Respondent's animus against the employees continued.

A mere continuation of backpay after the layoff date, as suggested by the General Counsel, without allowing Respondent any opportunity to terminate it, would be without precedent. It would also be anomalous to conclude that the discriminatees would never have been laid off absent the unlawful refusal to promote them, but to allow them no remedy other than indefinite backpay. Recall of the discriminatees from their layoff status would not automatically terminate backpay absent a specific provision for same, and would still leave the employees in a casual employee status.

Accordingly, I shall recommend that Respondent be ordered to offer employment as regular full-time employees to the discriminatees in their former type of work, or if such work no longer exists, in substantially equivalent work, dismissing if necessary any employee hired to do the work formerly engaged in by the discriminatees.

I shall further recommend that Respondent be ordered to make each of the discriminatees whole by paying him a sum of money equal to the amount he would have earned, less net interim earnings, from the date of Respondent's unlawful refusal to accord him regular status (November 12, 1990), through the date of layoff (January 21, 1991), until Respondent's offer to employ him as described above. Such earnings shall be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[38]

I shall also recommend the posting of notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Atlanta Motor Line, Inc., Conley, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling union stewards in the presence of employees that a union recommendation of employees for promotion to regular status constitutes a ''kiss of death,'' and that employees with strong union ties will not be hired.

(b) Interrogating employees about any union recommendation for their promotion, or about their relationship with the Union.

(c) Telling employees that the Respondent will not hire anybody sympathetic to the Union, and that it would be best for individuals with such sympathies to find jobs elsewhere.

(d) Discouraging membership in Teamsters Local 728, or any other labor organization, by refusing to promote employees or accord them regular status because of their union activities or sympathies, or other protected concerted activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of work.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

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[37] G.C. Br. at 1, 10.

[38] Under *New Horizons*, interest is computed at the ''short term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp*., 231 NLRB 651 (1977).

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jerry Haney, Derol Braddy, and Wayne Hume employment as regular full-time employees in their former type of work, or, if such work no longer exists, substantially equivalent work, dismissing if necessary any employee hired to do such work, and make each of them whole for any loss of earnings he may have suffered because of Respondent's discrimination against him, in the manner described in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business at Conley, Georgia, copies of the attached notice marked ''Appendix.''[40] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''